IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
JOSEPH J. PORZENSKI,	**)**	**Supreme Court #SC87119**
	)	
Respondent.	**)**	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Background and Disciplinary History

Respondent Joseph J. Porzenski was admitted to Missouri's bar in 1994. **App. 15 (T. 51)**. He practices in St. Charles County, Missouri. Respondent accepted an admonition in 1998 for violation of Rules 4-3.2 (failure to expedite litigation) and 4-8.4(d) (conduct prejudicial to the administration of justice) in that a circuit judge issued Mr. Porzenski a contempt and show cause order after Respondent failed to appear for several docket calls. **App. 36**.

Facts Underlying Rule Violations

In February of 1997, Robert and Elaine Price (now Elaine Neal) retained a law firm in which Respondent was employed to represent them in a medical malpractice action arising out of a medical procedure performed on Elaine Price in February of 1997. **App. 35**. Both Elaine and Robert Price signed separate contracts of employment with Mr. Porzenski and the firm for which he was working at the time. **App. 38-39**.

In February of 1999, Respondent filed a petition for personal injuries on the Prices' behalf in St. Louis County Circuit Court. The case was styled *Elaine and Robert Price v. Women's Care Gynecology, Inc., and Alan Palmer*, 99CC-000393. **App. 35**. The petition alleged that the Prices engaged the defendants, a doctor and the clinic in which he practiced, to terminate Mrs. Price's pregnancy. It was alleged that the defendants were negligent in failing to diagnose that Mrs. Price's pregnancy was tubal

and in failing to terminate the pregnancy. It was alleged that the pregnancy thereafter spontaneously terminated by way of eruption, causing Mrs. Price personal and emotional injuries. **App. 47-48**. Mr. Price asserted a claim for loss of consortium. **App. 8 (T. 22), 51**.

Mr. Price had not wanted his wife to get an abortion. Mrs. Price wanted the abortion. **App. 6 (T. 15)**. Mr. Price saw the lawsuit as a way to put the doctor, who performed abortions, out of business. **App. 9 (T. 27), 10 (T. 32)**. While the case was pending, Mr. Price provided Respondent with copies of cases involving tubular pregnancies and abortion wherein six-figure sums had been awarded. He did so not because he wanted money, but because he was out to get the doctor. **App. 9 (T. 27)**. Mr. Price is not sure how well he explained to Mr. Porzenski his feelings against abortion, but Porzenski knew the issue was a sensitive one between the Prices. **App. 6 (T. 16), 12 (T. 37), 15 (T. 52)**.

The Prices' lawsuit was set to go to trial on November 1, 1999. **App. 8 (T. 24)**. On September 27, 1999, a settlement conference was held in the St. Louis County Courthouse. **App. 16 (T. 55)**. After some negotiation, the defendants offered $50,000.00 to settle the case. In conveying that information to the Prices, Mr. Porzenski made the remark that everyone had a price. **App. 7 (T. 17)**.[1] At that point, Mr. Price came to the realization that it all boiled down to money, which an insurance company was going to pay, so nothing was going to change. **App. 8 (T. 22-23), 13 (T. 43)**. Mr. Price felt he

[1] Mr. Porzenski denies making such a remark. **App. 17 (T. 60)**.

was selling out his principles. He told Mr. Porzenski to remove him [Mr. Price] from the case; that he did not want anything more to do with the lawsuit. **App. 7 (T. 17), 17 (T. 59)**. Mr. Porzenski looked Mr. Price in the eye and said he would honor Mr. Price's request. Mr. Price then told Mrs. Price that the case was a matter for her, Mr. Porzenski, and the doctor to resolve. Mr. Price left the conference room in which he and Mrs. Price had been seated and participated no further in the settlement negotiations. **App. 7 (T. 18)**.

Mr. Price never retracted the directive given to Mr. Porzenski to remove him from the case. Mr. Price considered the case a matter for his wife to resolve, and he believed he had washed his hands of it. **App. 7 (T. 18), 13 (T. 41)**. Mr. Price's testimony about what he told Mr. Porzenski is set forth below.

> Q: How was the issue of your further participation in the lawsuit left on September 27?
>
> A: There was not to be any participation.
>
> Q: And did you have an understanding as to what was to happen next regarding your participation in the lawsuit?
>
> A: I didn't think I'd have any participation, my understanding was, I had washed my hands of everything and I didn't know what procedures or anything would follow after that.
>
> Q: Did you ever retract your insistence on being removed as a named Plaintiff from the lawsuit?
>
> A: Not until this day.

Q: And you're not doing it this day?

A: Right, and I'm not doing it today; so, never.

Q: What was your position on whether Elaine settled the case against the doctor?

A: At that point I wasn't involved, I wasn't the one who suffered injuries, it had nothing – that was between Mr. Porzenski, her, and Dr. Palmer.

App. 7 (T. 18).

Q: Did you use the word "remove"?

A: Yes, I did.

Q: And at any point from that moment forward in time, did you ever retract from that to either Elaine or Mr. Porzenski, retract your instruction to be removed from the case?

A: No, Elaine was well-aware of my feelings throughout this whole ordeal.

App. 13 (T. 41).

Mr. Porzenski acknowledged in his testimony that Mr. Price told him, "I don't want any part of this, I want to be dismissed out, I want out of the lawsuit." **App. 17 (T. 59)**.

Mr. Porzenski did not move to dismiss Mr. Price from the case.[2]

The settlement paperwork, consisting of a release, a stipulation for dismissal, and the settlement check, arrived at Mr. Porzenski's office about a month later. The paperwork included signature lines for both Mr. Price and Mrs. Price. When Elaine Price told Mr. Price that the check had come and that they both needed to go to Mr. Porzenski's office to endorse it, Mr. Price refused. He had been unaware that he was still named in the suit. **App. 12 (T. 40)**.

Although Mr. Price's name is signed on the release and on the stipulation for dismissal, Mr. Price never signed the documents. Nor did Mr. Price authorize anyone else to sign them for him. **App. 7-8 (T. 20-21)**. Mr. Price told Elaine he would not endorse the check, and in fact Mr. Price did not endorse the settlement check. **App. 7 (T. 19), 12 (T. 39)**. He does not know who endorsed the check by signing his name. **App. 13 (T. 44)**. Mr. Price had no communication with Mr. Porzenski between the settlement conference on September 27, 1999, when he had instructed Mr. Porzenski to remove him from the case, until he wrote Mr. Porzenski a letter in March of 2000. **App. 11 (T. 36)**.

When Mr. Price realized that he remained a party to the lawsuit notwithstanding his directive to Mr. Porzenski to remove him, he felt betrayed, a sense of distrust, and that an injustice had been done. **App. 8 (T. 21)**. Mr. Price believes that Mr. Porzenski

[2] According to Respondent, after defense counsel rejected the proposal to dismiss Mr. Price from the case, Mr. Price agreed to allow the matter to be settled with Mr. Price remaining as a party. **App. 18 (T. 61-63)**.

deceived him at the settlement conference by saying he would take Mr. Price off the case, then not doing it. **App. 14 (T. 46)**.

The release bearing what purports to be the signatures of Mr. Price and Elaine Price includes an attestation signed by Mr. Porzenski stating he had fully explained the terms of the release to Mr. and Mrs. Price, and that they signed the release in Mr. Porzenski's presence. **App. 55-57**. Mr. Porzenski was not present when the release was signed. **App. 20 (T. 70)**. He does not know who came to his office and signed the settlement documents. **App. 23 (T. 82)**. Mr. Porzenski did not explain the terms of the release to the Prices. **App. 21 (T. 74-75)**. When Mr. Price questioned the validity of his signature in a letter to Mr. Porzenski the following March, Respondent questioned his secretary and the receptionist about it. According to Mr. Porzenski, they could not remember the event. **App. 26 (T. 95-96)**.

Disciplinary Case

In July of 2001, Robert Price filed a complaint against Mr. Porzenski. A complaint file was opened and referred to a disciplinary committee in St. Louis for investigation. In October of 2002, the committee voted to dismiss the complaint, but cautioned Respondent by letter dated November 13, 2002, that the "Committee determined that it did indeed believe that you were aware that Mrs. Price forged Mr. Price's signature on the settlement check or that you actually instructed her to do so. The Committee has requested that you refrain from such conduct in the future." **App. 58**. In December of 2002, Mr. Price requested the advisory committee to review his complaint.

By letter dated April 21, 2003, the advisory committee referred the complaint to OCDC for further consideration.

On December 30, 2003, disciplinary counsel and Mr. Porzenski filed in the Supreme Court a motion for leave to file the information and stipulation directly with the Court, along with a joint stipulation of facts, joint conclusion of law (that the facts constituted violation of Rule 4-8.4(c)), and a joint recommendation for discipline. The matter was assigned number SC85745. On January 27, 2004, the Court rejected the jointly proposed discipline.

A disciplinary information was thereafter served on Mr. Porzenski on February 2, 2004. The information charged Respondent with violation of Rules 4-1.2(a) (failure to abide by a client's decision concerning the representation), 4-1.7(b) (continuing to represent a client after another client's interests posed a material limitation on his ability to represent that client), and 4-8.4(c) (engaged in conduct involving deceit and misrepresentation). **App. 59-62**.

Mr. Porzenski answered the information on March 1, 2004. The advisory committee chair appointed a panel to hear the matter by way of letter dated April 20, 2004. The case was set for hearing on June 30, 2004, but was thereafter postponed due to a scheduling conflict. The hearing was reset to occur and was conducted on September 9, 2004.

The disciplinary hearing panel issued its decision on July 19, 2005. The panel concluded that Respondent was guilty of violating Rule 4-8.4(c) and recommended a

suspension with no leave to apply for reinstatement for thirty days. The panel concluded that Respondent did not violate Rules 4-1.2(a) or 4-1.7(b). **App. 63-78**.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-8.4(c) IN THAT HE ATTESTED TO FACTS THAT WERE NOT TRUE.

In re Disney, 922 S.W.2d 12 (Mo. banc 1996)

In re Donaho, 98 S.W.3d 871 (Mo. banc 2003)

In re Wallingford, 799 S.W.2d 76 (Mo. banc 1990)

Rule 4-8.4(c)

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.2(a) (FAILURE TO ABIDE BY CLIENT'S DECISION CONCERNING THE REPRESENTATION) IN THAT HE DID NOT MOVE TO DISMISS MR. PRICE FROM THE LAWSUIT AS MR. PRICE DIRECTED HIM TO DO.

In re Mirabile, 975 S.W.2d 936 (Mo. banc 1998)

In re Shelhorse, 147 S.W.3d 79 (Mo. banc 2004)

Rule 4-1.2

POINTS RELIED ON

III.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE LAW WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR SIX MONTHS BECAUSE HE KNOWINGLY, BUT FALSELY, VOUCHED FOR THE VALIDITY OF MR. PRICE'S SIGNATURE ON LEGAL DOCUMENTS, IN THAT RESPONDENT SIGNED AN ACKNOWLEDGEMENT STATING THAT RESPONDENT EXPLAINED THE RELEASE TO THE PRICES AND THAT THEY SIGNED IT IN RESPONDENT'S PRESENCE WHEN NEITHER OF THOSE FACTS WAS TRUE.

In re Crews, 159 S.W.3d 355 (Mo. banc 2005)

In re Donaho, 98 S.W.3d 871 (Mo. banc 2003)

In re Cupples, 979 S.W.2d 932 (Mo. banc 1998)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-8.4(c) IN THAT HE ATTESTED TO FACTS THAT WERE NOT TRUE.

In early November of 1999, what purports to be Robert Price's signature was signed on documents pertaining to settlement of the case of *Price v. Women's Care Gynecology,* 99CC-393. Specifically, the signature appears on the release, a stipulation for dismissal (subsequently filed in court on November 8, 1999), and on the back of a settlement check. It is not disputed that Mr. Price did not sign his name to any of the foregoing documents, nor did he authorize anyone else to sign his name for him. Mr. Price's refusal to sign the documents was entirely consistent with the position taken by him during the settlement negotiations, at which time he decided, and so advised Mrs. Price and Mr. Porzenski, that he wanted to be removed from the lawsuit and to have nothing further to do with it.

The record does not tell us who signed Mr. Price's name to the legal documents. It goes without saying that Informant did not plead allegations she did not have evidence to support. The forger remains unidentified, and it is not alleged that Mr. Porzenski was the forger. What has been alleged, and acknowledged by Mr. Porzenski, is that he signed off on the release and the stipulation for dismissal without witnessing who signed them, even though the release required his acknowledgment that both of his clients signed the document in his presence. The dishonesty inherent in that action is only exacerbated by

the circumstances under which the case was settled. Mr. Price unequivocally testified that he directed Mr. Porzenski to remove him from the lawsuit, and never retracted that instruction. Even if the Court believes Mr. Porzenski's testimony that Mr. Price subsequently retracted that directive, Mr. Porzenski should have been very sensitive to the necessity, in this case, of requiring both of his clients' involvement in the settlement. Even if Mr. Porzenski's testimony that Mr. Price withdrew his demand to be dropped from the lawsuit is believed (Mr. Price repeatedly testified he never withdrew the demand), the circumstances make Respondent's failure to witness the proper execution of the settlement documents all the more egregious.

Mr. Porzenski signed his name directly below the paragraph set forth below, which constituted page four of the release and settlement.

> I, Joseph Porzenski, having fully explained the terms of the foregoing Release and Indemnity Agreement to my clients, Elaine Price and Robert Price, and they have indicated that they fully understand the terms, effect and implications of affixing signatures hereto. The foregoing was signed by Elaine Price and Robert Price of their own free will and volition in my presence.

The foregoing facts were not true. Mr. Porzenski has repeatedly admitted that he did not have any joint discussions with the Prices about the release, nor any joint communications with them after the settlement conference in September. By signing his name, Mr. Porzenski attested to simple facts that were not true and that he knew were not true.

Honesty and loyalty to a client are a lawyer's stock in trade. "Questions of honesty go to the heart of fitness to practice law." *In re Disney*, 922 S.W.2d 12, 15 (Mo. banc 1996). Lawyers must be dedicated to clients' interests and must comport themselves with "unfailing honesty." *In re Donaho*, 98 S.W.3d 871, 876 (Mo. banc 2003). A lawyer's signature should impart a degree of reliability that will allow legal work to go forward without second guessing. "An attorney should not execute a certificate of service unless the facts stated are known to the attorney to be true. Any departure from these precepts diminishes the stature and credibility of the entire legal profession." *In re Wallingford*, 799 S.W.2d 76, 78 (Mo. banc 1990). While the quotation from *Wallingford* deals specifically with a certificate of service, the precept applies equally to any legal document relied on by society in the fair administration of our system of justice. And, as the *Wallingford* Court noted, the damage to the profession is not undone because no quantifiable "harm" resulted. 799 S.W.2d at 78. Mr. Price testified that his experience with Mr. Porzenski left him with a feeling of betrayal, of distrust, and that an injustice had been done. The integrity of the profession as a whole suffers when a litigant justifiably can describe his experience with his lawyer in those terms.

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.2(a) (FAILURE TO ABIDE BY CLIENT'S DECISION CONCERNING THE REPRESENTATION) IN THAT HE DID NOT MOVE TO DISMISS MR. PRICE FROM THE LAWSUIT AS MR. PRICE DIRECTED HIM TO DO.

It was alleged in the information that "Mr. Price communicated to Respondent that he did not wish to settle the case and that he wanted his name removed from the lawsuit." **App. 60**. It was further alleged that "Mr. Price remained a named plaintiff in *Price v. Women's Care Gynecology, Inc.*," **App. 60**, and that Mr. Porzenski committed professional misconduct "by not abiding by Mr. Price's decision to have his name withdrawn as a plaintiff from *Price v. Women's Care Gynecology, Inc.*, 99CC-393." Mr. Price's testimony at hearing before the panel fully supported the factual allegations underlying the Rule 4-1.2 charge of misconduct, thereby substantiating Informant's case by the required preponderance of evidence.

In concluding that Respondent did not violate Rule 4-1.2, the disciplinary hearing panel did not find facts contrary to the information's allegations and the evidence supporting them. Nor did the panel make a finding that Respondent's version of what happened was more credible. Instead, the panel's decision differentiates between abortion and the negligent performance of a medical procedure. **App. 68-69**. The problem with the panel's lack of material fact finding to support its legal conclusion that

Respondent did not violate Rule 4-1.2 is that Mr. Price's personal beliefs are not the engine that drives the misconduct case. Mr. Price's personal beliefs are only tangentially relevant to the pleaded misconduct. Regardless of how Mr. Price's personal beliefs may be reconciled with his willingness, at least initially, to join his wife as a co-plaintiff in her personal injury case, Informant pled and offered evidence that Mr. Price changed his mind about proceeding in the lawsuit as a party. Mr. Porzenski was obliged to follow his client's instructions within the limits of the law. *In re Mirabile*, 975 S.W.2d 936, 939 (Mo. banc 1998). Cf. *In re Tepper*, 126 Ill.2d 109, 533 N.E.2d 838 (1988) (attorney suspended for, inter alia, recording a deed in contravention of client's instructions in order to protect the interests of a third party).

The evidence is that during the settlement negotiations, Mr. Price "communicated to Respondent . . . that he wanted his name removed from the lawsuit." Because Mr. Price was Mr. Porzenski's client, distinct from Mrs. Price, who was also Mr. Porzenski's client, Mr. Porzenski was obliged to follow Mr. Price's directive to remove Mr. Price from the case. Just how minor Mr. Price's consortium claim was to the overall value of the case, just how difficult or unreasonable Mr. Price's last minute decision was, and just how fair the decision was to Mrs. Price, do not nullify Respondent's violation of the Rule. Informant alleged and offered Mr. Price's unwavering testimony that he told Mr. Porzenski he wanted out of the case, that he never retracted that instruction, and that he learned subsequently, to his mortification, that Mr. Porzenski had done nothing to remove him as a party.

Disciplinary counsel must prove professional misconduct by a preponderance of evidence. Disciplinary counsel alleged and offered Mr. Price's sworn testimony to prove that he, as Mr. Porzenski's client, told Mr. Porzenski to remove him from the case, and that he never retracted that instruction. The undisputed evidence is that Mr. Porzenski did not do so and settled the case with Mr. Price's name still on it. The Supreme Court reviews disciplinary records de novo, "independently determining all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions." *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004). The Court may ultimately determine to disbelieve Mr. Price's testimony, and to instead believe Mr. Porzenski's testimony that Mr. Price subsequently retracted his directive. Before doing so, however, the Court is reminded that the panel, which saw and heard the live testimony of the witnesses, did not find Mr. Price's testimony not credible, even though it concluded that Mr. Porzenski did not violate Rule 4-1.2. It is suggested that the panel did not make that finding because Mr. Price's testimony was credible. The panel may have been reaching for answers to questions not raised by the information, which was filed by Informant after investigation and due consideration of the evidence available to substantiate potential charges. The panel was obliged to hear and decide this case on the information that was filed. The credible weight of the evidence leads to the conclusion that Mr. Porzenski did violate Rule 4-1.2.

ARGUMENT

III.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE LAW WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR SIX MONTHS BECAUSE HE KNOWINGLY, BUT FALSELY, VOUCHED FOR THE VALIDITY OF MR. PRICE'S SIGNATURE ON LEGAL DOCUMENTS, IN THAT RESPONDENT SIGNED AN ACKNOWLEDGEMENT STATING THAT RESPONDENT EXPLAINED THE RELEASE TO THE PRICES AND THAT THEY SIGNED IT IN RESPONDENT'S PRESENCE WHEN NEITHER OF THOSE FACTS WAS TRUE.

The suspension sanction recommended by the disciplinary hearing panel to the Court is in accord with the result obtained after analysis of this case under the ABA Standards for Imposing Lawyer Sanctions (1991 ed.) framework. The more egregious of the misconduct charges is the dishonesty violation (4-8.4(c)) described under the first point relied on. The duty violated was owed both to the client, Mr. Price, and to the legal system, in that Mr. Porzenski affirmatively acknowledged facts on legal documents that were not true. Mr. Porzenski knew, when he signed the release, that he had had no joint communication with the Prices about the release and that he had not witnessed the signing of the release by the Prices "of their own free will and volition in my [Mr. Porzenski's] presence." The potential injury to the profession is manifest in Mr. Price's loss of faith and sense of betrayal, and in the disturbing fact that a joint stipulation for

dismissal, filed in the St. Louis County Circuit Court, bears Mr. Price's forged signature. Aggravating the sanction analysis are the following factors: prior offense (admonition for violation of Rules 4-3.2 and 4-8.4(d)), and a dishonest or selfish motive (desire to settle contingent fee case notwithstanding client's last minute balk). See *In re Friesen*, 268 Kan. 57, 991 P.2d 400 (1999) (per curiam) (lawyer's financial self-interest served by settling contingency fee case notwithstanding client's instruction to dismiss the case).

Suspension is the appropriate baseline sanction in any case involving a violation of Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The most applicable ABA Standard, it is suggested, is Rule 6.12, which provides as follows:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Although no discipline case is identical to another, the Court generally imposes suspension in cases involving dishonesty. See *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005), *In re Donaho*, 98 S.W.3d 871 (Mo. banc 2003), *In re Cupples*, 979 S.W.2d 932 (Mo. banc 1998), *In re Disney*, 922 S.W.2d 12 (Mo. banc 1996).

The duration of any suspension is, of course, an inherently subjective determination. The panel recommended a thirty day suspension, which was in line with the recommendation made by disciplinary counsel to the panel. **App. 31 (T. 113-114)**. Disciplinary counsel now recommends suspension with no leave to apply for

reinstatement for six months, a recommendation more in accord with disciplinary counsel's understanding of the Court's interpretation of its Rules.

CONCLUSION

The misconduct case pled and proven by more than a preponderance of evidence establishes violation of Supreme Court Rules 4-1.2(a) and 4-8.4(c), in that Mr. Porzenski failed to abide by Mr. Price's instructions to dismiss him out of the lawsuit, and then, notwithstanding his attestation to the contrary, did not discuss the settlement documents with his clients or witness their execution. It is Informant's recommendation that Respondent's license to practice law be suspended with no leave to apply for reinstatement for six months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2005, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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Sharon K. Weedin

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 4,490 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin

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